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Supreme Court, U.S.
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In The

Supreme Court of the United States

KENNETH R. WOOTEN,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Georgia

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. When in questioning a juror claimed to be biased, a trial court has found the juror believes the evidence is insufficient but is able to impartially deliberate, may the trial court, consistent with the Sixth Amendment, later dismiss the juror when it determines the juror unintentionally failed to disclose a passing knowledge of the defendant in voir dire?

2. When a prosecuting officer in violation of state law makes up the trial calendar, chooses the judge, and selects a case out of order to try, does the resulting conviction violate structural due process and offend "a sense of justice"?

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IV. BASIS FOR JURISDICTION OF THIS COURT

A. Date of Orders To be Reviewed

On March 2, 2001, the Supreme Court of Georgia reversed the Georgia Court of Appeals' judgment for petitioner on the second issue presented and remanded to the Georgia Court of Appeals which on July 19, 2001 affirmed Petitioner's conviction based on the first issue presented in this petition. On February 25, 2002, the Supreme Court of Georgia denied petitioner a writ of certiorari on the first issue.

B. Jurisdictional Basis For Review

Under the provisions of 28 U.S.C. § 1257, this Court has jurisdiction to review the final order of a lower state court when certiorari is denied by the state's court of last resort.

C. Constitutional Provisions, Statutes and Rules

This petition involves the Sixth Amendment right to a jury trial and the due process clause of the Fourteenth Amendment to the United States Constitution as well as the Georgia juror replacement statute, O.C.G.A. § 15-12-172 and the *Georgia Uniform Superior Court Rule 3.1* governing case and judge assignment.

The *Sixth Amendment* states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The *Fourteenth Amendment* states in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

O.C.G.A. § 15-12-172 states in pertinent part:

> "If at any time, whether before or after final submission of the case to the jury, a juror dies, becomes ill, upon other good cause shown to the court is found to be unable to perform his duty, or is discharged for other legal cause, the first alternate juror shall take the place of the first juror becoming incapacitated."

V. STATEMENT OF THE CASE

Petitioner was indicted on 7 April 1997 by a Dade County Grand Jury of four counts of child molestation, one count of aggravated child molestation, and one count of aggravated sodomy, for alleged acts upon his grandchild. (R-3-10).

Petitioner entered his plea of not guilty on the 17th of April 1997 and timely moved for legal case assignment under Georgia Uniform Superior Court Rule 3.1 and the Fourteenth Amendment to the United States Constitution. Petitioner's trial counsel claimed that using the prosecutor to choose a judge, and case for trial violated Rule 3.1 and the Fourteenth Amendment due process clause. (R-3, 39-42).

Petitioner's motion for case assignment was denied by the court hearing Petitioner's motions on 24 April 1997. (R. 55) (Remand Hearing Transcript – hereafter RHT-16,17).

After the District Attorney chose to try Petitioner's case and chose the judge in front of whom the case would be tried, Petitioner renewed all his previous motions denied at the motion hearing, and the trial court denied them. (RHT-11,42) (T-4).

On the third day of jury deliberations, the trial court dismissed a juror favoring Petitioner, and the reconstituted jury reached a verdict that afternoon, finding Petitioner guilty of four child molestation counts and not guilty of aggravated child molestation and aggravated sodomy. (T-583,586).

Petitioner was sentenced on the 20th of June 1997 to ten years to serve followed by thirty years of probation, and he timely moved for a new trial and appealed the verdict and judgment.

The Georgia Court of Appeals ordered Petitioner's appeal transferred to the Supreme Court of Georgia on 7 September 1999 (Appendix-18-19). On 15 October 1999, after it had decided the illegality of the prosecutor case assignment system in another appeal, the Supreme Court of Georgia ordered Petitioner's case remanded for application of its decision (Appendix-17). The Georgia Court of Appeals reversed Petitioner's conviction finding a structural due process violation in the prosecutor's role in the case assignment system. *Wooten v. State,* 244 Ga.App. 101, 533 S.E.2d 441 (2000) (Appendix 13).

The Georgia Supreme Court granted certiorari (Appendix-12), and it reversed the Georgia Court of Appeals

and remanded the case to the Georgia Court of Appeals to determine the juror substitution issue. *State v. Wooten,* 273 Ga. 529, 543 S.E.2d 721 (2001) (Appendix-5-11). The Georgia Court of Appeals affirmed Petitioner's conviction and the trial court's substitution of a juror favoring Petitioner. *Wooten v. State,* 250 Ga.App. 686, 552 S.E.2d 878 (2001) (Appendix-1-4). The Supreme Court of Georgia denied Petitioner's petition for certiorari on 25 February 2002 (Appendix-20).

VI. STATEMENT OF MATERIAL FACTS

Dade County, Georgia has two court terms per year, and each term is utilized for the trial of criminal matters, yielding one week of criminal court per term. In addition, the County has two courtrooms used for criminal jury trials. (RHT-41).

In the April 1997 term of Court in which Petitioner was tried, Petitioner's case was tried in one courtroom, while another case was tried in the other courtroom. Each of the cases commenced on April 28, 1997. (RHT-41,42).

In the term of Court in which Petitioner was tried as in other terms, the Lookout Mountain District Attorney's office promulgated the calendar for the criminal court and at trial assigned cases for trial to judges. (RHT-42,43) The Dade County Clerk of Court had no role in selecting or arranging cases in the calendar or assigning cases (RHT-42,43).

That term, as in other terms, after the conclusion of the calendar call, the judge on the bench in the main courtroom requested the prosecutor to sound the case it had decided to try in the second courtroom and then the

case it had decided to try in the main courtroom, allocating jurors to each courtroom. (RHT-42).

Petitioner's defense attorney at trial was not given a choice of the judge who would hear the case or in which courtroom she wished to try the Wooten case. (RHT-42).

The Lookout Mountain Judicial Circuit and the Dade County Superior Court did not have a written case assignment system in operation during the April 1997 term of Dade Superior Court. (RHT-3). The Circuit was served by four Superior Court judges (RHT-41). Petitioner's trial came prior to any formal election by the Lookout Mountain Superior Courts to forego case assignment in Rule 3.1. (RHT-3, 43).

At the end of the second day of deliberations, the jury was split 9 members to 3. (T-562). On the third day of deliberations, the foreperson of the jury approached the Court and said that she felt that a juror was being "impartial or unfair" based upon an association with one of the parties, and that his mind was made up when he went through the door (T-565-567).

The Court stated to Petitioner's trial counsel as follows:

> "And it is very obvious, Mrs. Melton, that she's talking about somebody wanting to find him not guilty. I mean, that appears to me to be what she's saying." (T-568).

The juror, a Mr. Dillard Wells, was voir dired by the Court as follows:

> "The Court: . . . The Forelady feels that you have already made up your mind about this case because of some association that you have with

some of the family members in this case and that you have expressed that to other jurors. And so I'm just going to ask you if that's true and if it is true we would like to know."

"The Juror: No, no more than I said I knowed him. I said that to all of the jurors, yes, sir, I did. I know him but I don't guess I spoke to the man, oh, half a dozen times in the last ten years."

"The Court: Okay. Do you feel that your knowledge of Petitioner is affecting your ability to look at both sides of the case and apply the law to the evidence?"

"The Juror: No, sir, I don't." (T-570-571).

Juror Wells confirmed his doubts about the state case and denied making up his mind until an hour before they adjourned on the second day of deliberations. He asked to explain himself, and he repeated that he was not at all influenced by something outside of the evidence in the case. (T-572).

Based upon juror Wells' responses, the Court noted that the juror said he was fair and impartial and there was no way it could discharge him. Petitioner's trial counsel objected to the voir dire as coercive at that stage in jury deliberation. (T-573).

Later juror Wells was brought back by the trial court when counsel determined that Wells had not answered that he knew the Petitioner in voir dire. The juror repeated that "when I see him I know him," and the juror could give no reason why he didn't tell the lawyers. The trial court once again sent him back to deliberate, and the juror stated, "I don't mind. I want to do the right thing

about it anyway." (T-576). The trial court responded, "I know you do", evincing its belief in the juror's credibility.

After finding that the jury had reached unanimous verdicts on two counts (T-577), the trial court ruled that it would replace Mr. Wells with the alternate because Wells had not honestly complied with his voir dire oath. (T-580). Petitioner's trial counsel objected to Wells' removal (T-581). In replacing Wells, the trial court stated, "I'm not saying in any way that you intentionally did anything wrong and the lawyers don't feel that way. What did concern me is the fact that they didn't disclose you knew the defendant. If [the prosecutor] had known that or maybe even [Petitioner's trial attorney], that might have affected their decision to strike you or let you remain on the jury. You paid close attention to the case. I watched you as I did all of the other jurors and you carried forward with your duties as a juror."

The court replaced Mr. Wells with the alternate and then recharged the jury to reach verdicts on all the counts, including those in which they had formerly reached and signed verdicts. (T-582).

Nothing in the record indicates on what counts the first twelve jurors had reached unanimous verdicts prior to the replacement of Juror Wells. The reconstituted jury started deliberations at 10:21 a.m. (T-583) and they reached verdicts in all of the counts published in open court at 2:19 p.m. (T-585).

VII. ARGUMENT AS TO NECESSITY OF REVIEW

A. The Court Needs To Set A Standard For Removal Of Holdout Jurors By Trial Courts

In Georgia, O.C.G.A. § 15-12-172 allows discretionary removal of a juror during deliberation if "good cause" is shown for the juror's inability to perform their duty or for any "legal cause". The comparable federal law involves *Federal Rule of Criminal Procedure, Rule 23(b)*, which in its amended form allows a district court judge to remove a juror for "just cause" after deliberations have begun. In cases involving jurors who are holdouts not believing the government case, each of these rules may permit juror removals which infringe upon the right of an accused to a jury trial under the *Sixth Amendment to The United States Constitution.*

The trial court in petitioner's case specifically found that juror Wells was able to deliberate impartially given his knowledge of the petitioner, and that Wells did not believe the government's case. Yet, the trial court dismissed the juror after finding that he unintentionally failed to give his limited knowledge of the defendant in voir dire. This "legal cause" apparently sufficed to trump any *Sixth Amendment* right of the Petitioner.

Relying upon O.C.G.A. § 15-12-172 and using juror Wells' unintentional lack of response in voir dire, the Georgia Court of Appeals found, after two and one-half days of deliberations and two verdicts, that the trial judge in Petitioner's case had discretionary power to remove juror Wells for such a legal cause even when that juror doubted the sufficiency of the evidence and when the trial court had already found him able to deliberate impartially.

Wooten v. State, 250 Ga.App. 686, 552 S.E.2d 878 (2001) *(Appendix-1).*

In *U.S. v. Brown,* 823 F.2d 591, 597 (D.C. Cir. 1987), in an opinion by circuit judge Mikva, a panel of the D.C. Circuit Court found that juror removal under *Rule 23(b)* of the *Federal Rules of Criminal Procedure* is not available when the record evidence discloses a possibility that the juror believes that the government has failed to present sufficient evidence to support a conviction. *U.S. v. Brown,* 823 F.2d at 597.

The *Brown* court based its decision on a five justice acceptance of Justice Powell's concurring opinion in *Apodoca v. Oregon,* 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) which indicated that both the *Sixth Amendment* to the *United States Constitution* guarantee of jury trial and the requirement of unanimity in *Federal Rule of Criminal Procedure, Rule 31,*which derives from the constitutional requirement, gave defendants a right to a unanimous verdict.

Four other circuit courts have agreed with the rationale of *Brown*. *See U.S. v. Barone,* 114 F.3d 1284, 1309 (1st Cir. 1997) (using *Brown*, a juror removal affirmed where record evidence of juror doubt in government case not substantial); *U.S. v. Thomas,* 116 F.3d 606 (2nd Cir. 1997) (new trial ordered under *Brown* when minority holdout juror replaced); *U.S. v. Ross,* 886 F.2d 264, 267 (9th Cir. 1989) (adopting *Brown* as describing limit on district court discretion); *U.S. v. Symington,* 195 F.3d 1080, 1087 (9th Cir. 1999) (removal of distracted juror with defense leaning was cause for new trial); *U.S. v. Abbell,* 271 F.3d 1286, 1302 (11th Cir. 2001) (court adopted *Brown* standard but affirmed removal with beyond a reasonable doubt standard

that removed juror failed to exhibit substantial possibility that her decision was based upon the sufficiency of the evidence).

The juror in the *Brown* case told the district court he didn't believe in the RICO law and he couldn't follow it. However, because his later statements indicated his disbelief had something to do with the insufficiency of the evidence the government had introduced, the D.C. Circuit found that the district court abused its discretion in relieving the juror. *U.S. v. Brown,* 823 F.2d 591, 597 (D.C. Cir. 1987). The government in *Brown* claimed that the new standard would eviscerate *23(b)* as a useful rule. Focusing on other juror disqualification issues – like the *Brown* juror's disbelief in the RICO statute –, the other circuit courts have affirmed removals of jurors, without confronting the issue raised in *Brown*.

The Second Circuit Court in *U.S. v. Thomas,* 116 F.3d 606, 622 (2nd Cir. 1997) discussed the natural tendency of a strong majority in a jury favoring conviction to " . . . come to view the 'holdout' or 'holdouts' not only as unreasonable, but as unwilling to follow the court's instructions on the law". The *Thomas* court held out the *Brown* evidentiary standard as a way to protect those holdouts from the upset majority.

The United States Supreme Court has not directly decided the extent to which the *Sixth Amendment to The United States Constitution* limits a state or federal judge's discretion in removing jurors who show substantial possibility of not believing in the sufficiency of the evidence. However, in *U.S. v. Jorn,* 400 U.S. 470, 484, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), this court ruled that a district court abused its discretion by not showing a "manifest necessity"

prior to discharging a jury and that such a discharge barred further prosecution. Petitioner suggests that a similar standard be used for replacement of a juror a trial court finds substantially likely to not believe the government has proven its case.

There will always be other reasons alleged to support discretionary removal of holdout jurors. That is why mere discretionary authority should not be enough to support a removal when there is a substantial likelihood that a juror does not believe in the sufficiency of the evidence. Such unlimited discretion would eviscerate the right to a unanimous verdict by a particular tribunal under the *Sixth Amendment to the United States Constitution.*

There should be a "manifest necessity" shown prior to the federal district courts or the Georgia superior courts removing a juror who evinces his disbelief in the government case. When a juror is found to be capable of deliberating impartially, no unintentional failure to respond in voir dire should be sufficient to remove that juror for "other legal cause" and replace the juror with an alternate who has had no deliberations in the case.

In Georgia, the practice of replacement by an alternate counsels an even higher standard. *Federal Rule of Criminal Procedure § 23(b)* no longer suggests replacement with an alternate, as "[t]he inherent coercive effect upon an alternate who joins a jury leaning heavily toward a guilty verdict may result in the alternate reaching a premature guilty verdict." Moore, *Federal Practice 24.05* (2d ed. Cipes 1980). " . . . [I]t is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of earlier group discussion." *3 ABA*

Standards for Criminal Justice § 15-2.7, commentary (2d ed. 1980). In this case, Petitioner was convicted by a jury remade at the 11th hour with an alternate who not only replaced someone who doubted the government case, but who was unable to take that position without the benefit of earlier group discussion.

Petitioner's case has the factual basis for allowing a decision that would apply in all holdout juror removal cases. The law is not clear or consistently applied. The circuits approach removal using case by case discretion, and only five circuits have recognized the power of the *Brown* constitutional analysis. This Court can and should set the standard for federal and state trial courts dealing with complaints about a holdout juror.

B. The Court Should Stop Prosecutorial Judge Shopping And Control Of Trial Scheduling As A Violation of Structural Due Process And Due Process

Petitioner was tried in the Lookout Mountain Circuit of Georgia. In *Cuzzort v. State,* 271 Ga. 464, 519 S.E.2d 687 (1999) *(Appendix-31-33)*, the Supreme Court of Georgia found that the Lookout Mountain Circuit prosecutor case assignment practice used in Petitioner's trial violated Georgia Superior Court Rule 3.1. Specifically, it found that the Lookout Mountain Judicial Circuit's traditional case assignment scheme, which allowed the prosecutor in the case to unilaterally schedule the case for trial, make up the court calendar and match the case to a judge of the prosecutor's choice when trial day arrived, "fail[ed] to comply with the intent and purpose of the uniform rules and applicable statutes, and thus fail[ed] to serve the

administration of Justice." *Cuzzort v. State, supra (Appendix-33).*

Petitioner's trial attorney attempted to get a random draw of judge when she moved for case assignment prior to the *Cuzzort* opinion. The *Cuzzort* case, appealed pretrial, was decided as Petitioner's case was on appeal after the conviction of Petitioner. On remand from the Georgia Supreme Court in light of it's opinion in *Cuzzort*, the Court of Appeals in *Wooten v. State,* 244 Ga.App. 101, 533 S.E.2d 441 (2000) reversed Petitioner's conviction, writing as follows:

> "Wooten had a right to a fair trial. We cannot say that his trial, administered under a system so impugned by the Supreme Court, was fair. Although the State argues that no harm has been shown in this case, a reversal is still required. Initially, we note that this is the type of case where the harm is inherent in the system, although specific manifestations of harm may not be perceived. This is so because the harm arises from a breach of trust in the system of justice and from inherent human prejudices which are not always recognized even by those holding them. "[C]onvictions cannot be brought about by methods that offend 'a sense of justice.'" *Rochin v. California*, 342 U.S. 165, 173 (72 SC 205, 96 LE 183) (1952)."
>
> *Wooten v. State*, 244 Ga.App. 101, 533 S.E.2d 441 (2000).

The Georgia Supreme Court granted certiorari and reversed. It ruled that the prosecutorial judge selection and case timing advantages in Petitioner's circuit did not rise to a constitutional violation. As such, it subjected any error to a non-constitutional harm analysis and found that

there was a high probability that any harm done did not affect the verdict. *State v. Wooten,* 273 Ga. 529, 543 S.E.2d 721 (2001).

Although the Due Process Clause imposes neutrality requirements on officials performing judicial or quasi-judicial functions, those requirements "are not applicable to those acting in a prosecutorial or plaintiff-like capacity." *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 248, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980). "In an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law." Id. When prosecutorial rather than judicial functions are involved, "the constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated." Id.

Given this difference between prosecutors and judicial bodies, two state courts held that judicial assignment systems allowing prosecutors to select the judge assigned to a particular case violate due process. In *State v. Simpson,* 551 So.2d 1303 (La. 1989) *(per curiam),* in striking similarity to the agreement of the parties in the case at bar, the prosecutor and the defense attorney stipulated that in the Louisiana district at issue, the prosecution was allowed to select the judge who presided over criminal cases.

The Louisiana Supreme Court held that to meet due process mandates, felony cases must be assigned in a way that does not vest the District Attorney with authority to select the judge. It wrote that "[d]ue process of law requires fundamental fairness, i.e. a fair trial in a fair tribunal." 551 So.2d at 1304. In reviewing other decisions upholding case assignment systems, the Lousiana Supreme Court observed

that these decisions "do not stand for the proposition that the prosecutor may assign cases to the judge of his choice." Id. at 1304 n.3.

Some time ago, a New York state court took a similar approach in *McDonald v. Goldstein,* 83 N.Y.S.2d 620 (N.Y.Sup.Ct. 1948). In *McDonald*, the prosecutor had for some time selected judges in each criminal case. The court removed judge selection from the prosecutor and based its ruling on general principles of judicial independence, noting that judges should be free from outside control, especially by any of the litigants.

In *U.S. v. Pearson*, 203 F.3d 1243, 1259 (10th Cir. 2000), in a first impression case, the tenth circuit court reviewed and ultimately rejected a defendant's claim of a structural due process violation in prosecutorial judge shopping. There it reviewed limited circuit cases, and noted the Lousiana and New York cases. In *Pearson*, the defendant challenged a prosecutor who reordered names on an superceding indictment, resulting in random selection of a different judge. Pearson alleged that allowing the prosecutor to manipulate judge assignment was "a structural error, a fundamental 'defect[] in the constitution of the trial mechanism, which def[ies] analysis by "harmless-error" standards.' *Arizona v. Fulminante,* 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)." *U.S. v. Pearson*, 203 F.3d at 1260.

Although the *Pearson* court declined to go so far as to find that the prosecutorial judge manipulation there was a structural due process violation, it did grant that judge shopping could be a due process violation. In its analysis of harm, the *Pearson* court noted concerns about judge

shopping having an appearence of impropriety. In addition, when a practice was pervasive – as in Petitioner's case – , the *Pearson* court noted it might affect the actual independence of the judiciary, based upon a prosecutor's case selection for each judge. The *Pearson* court, given the limited effect of the prosecutor's name change on the district's random assignment system, found that neither concern was harmed by affirming Pearson's conviction.

In Petitioner's case, the Lookout Mountain Judicial Circuit was operating an admittedly illegal case assignment system. It allowed the prosecutor for over twenty years to steer cases to one of two judges for trial. The prosecutor had absolute decision as to which of two judges would get the case. The practice was pervasive and public. From actions of the trial court, the public and jurors were made aware of the power of the prosecutor to choose the case and choose the judge. The practice was harmful to the administration of justice and it created an appearance of improper actions by the prosecutor.

Some circuits dealing with judge shopping have required a showing of harm *See U.S. v. Gallo,* 763 F.2d 1504, 1532 (6th Cir. 1985); *U.S. v. Osum,* 943 F.2d 1394, 1401 (5th Cir. 1991). However, as the *U.S. v. Pearson,* 203 F.3d 1243, 1259 (10th Cir. 2000) court writes, those circuits requiring a showing of harm do not point out how that may be done. Inquiry into the motivation of prosecutors or their beliefs about any particular tribunal treads on ethical rules and professional proscriptions.

The Georgia Court of Appeals agreed, writing,

> "This is the type of case where the harm is inherent in the system, although specific manifestations of harm may not be perceived. This is so because the harm arises from a breach of trust in the system of justice and from inherent human prejudices which are not always recognized even by those holding them." *Wooten v. State*, 244 Ga.App. 101, 533 S.E.2d 441 (2000) *(Appendix-15)*.

Because finding specific harm in a constitutional analysis is virtually impossible, Petitioner shows that this Court should strongly consider applying a bright line to the practice of prosecutorial selection of judges. Judge shopping is never necessary, and the practice injects a taint into the whole prosecution. Petitioner shows that a pervasive system in which judges are matched to cases by the prosecutor is a violation of structural due process.

The issue of "judge shopping" is much more often connected with civil litigants in federal court or with defendants who have requested a transfer or recusal. Although these different contexts raise other issues, it is noteworthy that the district courts consider judge shopping a serious violation even subject to dismissal in civil cases.

In *Hernandez v. City of El Monte,* 138 F.3d 393 (9th Cir. 1998), the ninth circuit court of appeals reversed a dismissal for judge shopping, but wrote that the district court, had "the inherent power sua sponte to dismiss an action for Judge-shopping". It cited *Oliva v. Sullivan,* 958 F.2d 272 (9th Cir. 1992), a case involving dismissal for lack of prosecution where it held that "district courts have inherent power to control their dockets and may impose

sanctions, including dismissal, in the exercise of that discretion." Id. at 273. *Hernandez v. City of El Monte*, 138 F.3d at 399.

A "primary aspect" of every federal court's inherent power is "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). In *Hernandez v. City of El Monte*, the Ninth Circuit Court, citing *Chambers v. NASCO, Inc.*, wrote that judge-shopping clearly constitutes "conduct which abuses the judicial process." *Hernandez v. City of El Monte*, 138 F.3d at 399.

The circuits are aligned in the disapproval of a variety of procedural mechanisms by criminal defendants and by civil plaintiffs to change judges. Unless recusal is resisted, the courts write that litigants will judge shop.

See Robinson v. Boeing Co., 79 F.3d 1053 (11th Cir. 1996) (affirming district court denial of motion to add additional law firm creating a need for judge's recusal).

In re Cargill Inc., No. 94-8042 (1st Cir. 10 October 1995) (district court judge uses plaintiff law firm during trial but recusal motion of defendant is denied to avoid judge shopping). This Court dealt with the nature of recusal motions in *Liteky v. U.S.*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (U.S. 1994).

It is not so difficult to apply the mandate of the Ninth Circuit to Petitioner's case for conduct which "abuses the judicial process". The Lookout Mountain Judicial Circuit allowed the opportunity for systemic judge shopping. Appellant was tried in a system condemned for allowing judge shopping and other manipulation on the part of the

prosecutor. *See Cuzzort v. State, trial court order. Appendix-37, 38.*

A bright line rule banning prosecution involvement with judge selection would enhance the administration of justice, enhance the perception of the courts and protect the rights of criminal defendants to a trial untainted by judge shopping. Prosecutors would benefit by having more independence of the judiciary, and banning the practice has little cost. Petitioner urges this Court to grant certiorari and establish that prosecutorial judge shopping is a violation of structural due process.

VII. CONCLUSION

Petitioner urges this court to set out a standard for removal of holdout jurors who doubt the sufficiency of evidence to guide the state and federal courts and resolve any latent conflict in the circuits. Petitioner urges this court to set out a bright line across which prosecutors may not cross and to make prosecution judge shopping a violation of structural due process not subject to harmless error analysis.

Respectfully submitted,

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FOURTH DIVISION
BLACKBURN, C. J.,
ELDRIDGE, BARNES, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, December 14, 2000) http://www.appeals.courts.state.ga.us/rules.html

July 19, 2001.

In the Court of Appeals of Georgia
A99a2268. WOOTEN v. THE STATE. BL-106C

BLACKBURN, Chief Judge.

Following a jury trial, Kenneth R. Wooten appeals his conviction for four counts of child molestation,[1] contending that: (1) the method of assigning cases in the Lookout Mountain Judicial Circuit violated Uniform Superior Court Rule 3.1; (2) prior consistent statements of the victim were improperly allowed into evidence; and (3) a juror was inappropriately dismissed after deliberations had begun. For the reasons set forth below, we affirm.

1. In *Wooten v. State*,[2] this Court considered Wooten's contention that his case should be reversed because the method of assigning cases in the Lookout Mountain Judicial Circuit violated USCR 3.1. Citing *Cuzzort v.*

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[1] Wooten was acquitted on charges of aggravated child molestation and aggravated sodomy.

[2] *Wooten v. State*, 244 Ga. App. 101, (533 SE2d 441) (2000).

State,[3] we found that Lookout Mountain's method of assigning cases was improper because the Lookout Mountain District Attorney's Office created the criminal court calendar, assigned cases to judges, and actually called the cases to proceed. *Wooten*, 244 Ga.App. at 101-102. We further held that this system was inherently harmful to the defendant. Id at 102.

In *State v. Wooten*,[4] however, our Supreme Court reversed this Court's opinion, finding that "the district attorney's limited role in assigning cases to a judge and calling the court calendar did not violate Wooten's right to due process under the Georgia Constitution or the United States Constitution." The Supreme Court then went on to determine that, although the assignment method was contrary to USCR 3.1, it was "highly improbable that the error . . . contributed to the jury's verdict of guilty." Id at 533(3). Therefore, with regard to this enumeration of error, we vacate our prior opinion and adopt the Supreme Court's holding with regard to this issue.

2. Wooten's contention that the trial court improperly allowed prior consistent statements by the victim into evidence was found to be without merit in our prior opinion, and this finding was not reversed by our Supreme Court. Accordingly, this finding stands, and our previous determination remains dispositive of this issue.

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[3] *Cuzzort v. State*, 271 Ga. 464, (519 SE2d 687) (1999).

[4] *State v. Wooten*, 273 Ga. 529, 532(2), ___ SE2d ___ (2001).

3. Finally, Wooten argues that the trial court improperly dismissed a juror after deliberations had begun. We disagree.

The record shows that, during the voir dire of the jurors, the State asked jurors to reveal whether they knew the defendant or members of his family. No juror responded to this question. However, after the trial was finished and deliberations had begun, the jury foreperson reported to the trial court that she believed that another juror was being partial because he personally knew Wooten. The foreperson stated that this juror had indicated to the others that he was familiar with the defendant and that, through this association, he had no intention of considering the testimony of the victim.

The trial court then called the problematic juror into court and questioned him. At this time, the juror admitted for the first time that he knew the defendant, and he gave no valid explanation for failing to inform the State when he was originally asked about the association. The trial court did not immediately dismiss the juror because he stated that, despite his knowledge of the defendant, he would attempt to deliberate fairly. While deliberations continued, however, the trial court concluded that the juror should be dismissed for failure to comply with the voir dire oath of honesty. Wooten now appeals this decision.

OCGA § 15-12-172 provides: "If at any time, whether before or after final submission of the case to the jury, a juror dies, becomes ill, upon other good cause shown to the court is found to be unable to perform his duty, or is discharged for other legal cause, the first alternate juror shall take the place of the first juror becoming incapacitated."

This Code section gives the trial court "discretion to discharge a juror and replace him or her with an alternate at any time, and we will not reverse as long as the court's exercise of discretion has a sound legal basis." (Punctuation omitted.) *Worthy v. State*.[5]

In this case, such a sound legal basis existed. "It was not an abuse of discretion to conclude that the juror's failure to respond truthfully during voir dire, coupled with his admitted actions during jury deliberations, constituted legal cause for removal." *Norris v. State*.[6] And, contrary to Wooten's argument, the juror's statement that he would try to deliberate fairly does not change this result. Here, the trial court was faced with a juror whose veracity was clearly in question. Under such circumstances, we cannot say that the trial court abused its discretion in removing the juror. Id.

Judgment affirmed. Eldridge and Barnes, JJ., concur.

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[5] *Worthy v. State*, 223 Ga. App. 612, 613(1), (478 SE2d 421) (1996).

[6] *Norris v. State*, 230 Ga. App. 492, 495 (5) (496 SE2d 781) (1998).

In the Supreme Court of Georgia

Decided: MAR 2, 2001

S00G1574. THE STATE v. WOOTEN.

FLETCHER, Presiding Justice.

A jury in the Lookout Mountain Judicial Circuit convicted Kenneth R. Wooten in April 1997 of four counts of child molestation. The Court of Appeals for the State of Georgia reversed his conviction based on our decision in *Cuzzort v. State*[1] that the system for assigning cases in that circuit violated state law.[2] We granted the writ of certiorari to consider whether Wooten's conviction should be reversed because the district attorney called the case for trial and assigned it to a judge. Because we hold that the case assignment system is not unconstitutional and it is highly improbable that it contributed to the jury's verdict, we reverse the decision of the court of appeals.

1. Uniform Superior Court Rule 3.1 provides that the clerk of the superior court shall assign all cases in circuits with more than one judge, unless the judges adopt a different system by a majority vote. In 1981, the judges in the Lookout Mountain Judicial Circuit adopted a different case assignment system. Under its system, the judges are "designated and assigned to sit and preside on assigned days and weeks during the year in a designated county" to hear any civil or criminal matter that is called for trial before them. The judges establish their annual schedule and publish who will preside during each week of the

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[1] 271 Ga. 464 (1999).

[2] *Wooten v. State*, 244 Ga. App. 101 (2000).

grand jury, arraignments, criminal motions, pleas, and criminal jury trials in the circuit.

In *Cuzzort v. State,* we held that the circuit's method for calling cases for trial violated OCGA § 17-8-1 and its method for assigning cases to judges violated Uniform Superior Court Rule 3.1. Although we concluded that the existing system failed to serve the administration of justice,[3] we did not base our holding on a violation of the defendant's due process rights or any other provision of the Georgia Constitution or United States Constitution.[4] There was no evidence that the district attorney had manipulated the criminal justice system, engaged in prosecutorial misconduct, or exhibited bias in carrying out his duties. Instead, the trial court found that the district attorney had used the authority given his office in a fair manner solely to move the circuit's cases more efficiently through the courts.

Since we considered Cuzzort's challenge in an interlocutory appeal prior to trial, we were not required to consider the effect of our ruling on a conviction obtained under the case assignment system. This case raises the issue whether a defendant's conviction must be reversed based on a violation of OCGA § 17-8-1 and Uniform Superior Court Rule 3.1.

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[3] See Standards for Criminal Justice 3-5.1 ("Control over the trial calendar should be vested in the court.").

[4] See *Simeon v. Hardin,* 451 SE2d 858 (NC 1994) (holding that state statutes giving district attorney authority to set superior court's criminal trial calendar were facially constitutional but summary judgment should not have been granted on constitutional challenge to statute as applied).

2. Wooten contends that the illegal assignment system deprived him of due process by giving the district attorney discretion to allocate the first cases to be tried before the judge and jury during criminal trial week. The defendant concedes that he cannot produce evidence that the district attorney consciously acted in ways that denied him due process. Instead, he contends that the harm flows from the district attorney's control, as a party, over the whole trial process.

In our criminal justice system, the district attorney represents the people of the state in prosecuting individuals who have been charged with violating our state's criminal laws. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."[5] This special duty exists because the prosecutor represents the sovereign and should exercise restraint in the discretionary exercise of governmental powers.[6] Therefore, the district attorney is more than an advocate for one party and has additional professional responsibilities as a public prosecutor to make decisions in the public's interest.[7]

In the district attorney's role as an administrator of justice, he or she has broad discretion in making decisions prior to trial about who to prosecute,[8] what charges to

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[5] See *Carr v. State*, 267 Ga. 701, 712 (1997) (citations omitted).

[6] See Rules and Regulations of the State Bar of Georgia, EC 7-13, 241 Ga. 643, 700 (1978).

[7] Standards for Criminal Justice 3-1.1(b) (2d ed. 1980).

[8] *Lee v. King*, 263 Ga. 116 (428 SE 2d 326) (1993) (district attorney has discretion to dismiss cases prior to indictment in exchange for information); *State v. Hanson*, 249 Ga. 739 (295 SE2d 297) (1982)

(Continued on following page)

bring,[9] and which sentence to seek;[10] in our state district attorneys may also choose the court in which to prosecute juveniles who are accused of committing serious crimes.[11] "The choice of forum afforded the prosecutor is, like a similar choice given other litigants in other type cases, a mere consequence of the exercise" of powers provided by the statute on juvenile court jurisdiction.[12] A district attorney's actions generally must rise to the level of prosecutorial misconduct[13] or result from a structural defect in the trial mechanism[14] before an appellate court will reverse a defendant's conviction.

(prosecutors have exercised the power to decide which defendants to prosecute from the beginning of our criminal justice system).

[9] See *Knight v. State*, 243 Ga. 770 (257 SE2d 182 (1979).

[10] See Stephens v. State, 265 Ga. 356 (456 SE2d 560) (1995) (district attorney has discretion to seek life sentence for second drug offense); see also *Rower v. State*, 264 Ga. 323 (443 SE2d 839) (1994) ("Absent a showing that the district attorney acted in an unconstitutional manner with respect to his case, Rower may not inquire into the prosecutor's exercise of discretion in seeking the death penalty against him.").

[11] See OCGA § 15-11-5 (b) (2) (C) (giving district attorney discretion to decline to prosecute juvenile in superior court and to transfer it to juvenile court for adjudication); see also *Bishop v. State*, 265 Ga. 821 (1995) (holding that statutory provision did not violate separation of powers, due process, or equal protection).

[12] *Chapman v. State*, 259 Ga. 592 (385 SE2d 661) (1989).

[13] See *Carr*, 267 Ga. at 710-712 (prosecuting attorney's inappropriate and illegal conduct showed her disregard for due process and fairness and was inexcusable); *Williams v. State*, 258 Ga. 305, 311-312, (369 SE2d 232) (1988) (knowing use of perjured testimony to obtain a conviction).

[14] See *Arizona v. Fulminante*, 111 S.Ct. 1246, 1265 (1991) (constitutional errors that are not subject to harmless error analysis include structural defects affecting the framework within which the trial proceeds, such as total deprivation of the right to trial counsel or a trial

(Continued on following page)

In reviewing the district attorney's action in this case, we find that his decision to assign Wooten's case to a specific courtroom at the beginning of the criminal trial week was more analogous to other pre-trial decisions that we routinely permit district attorneys to make than to the acts of prosecutorial misconduct or structural defects in the trial process that require a reversal of the defendant's conviction. In Dade County, where Wooten was tried, two judges heard criminal jury trials during the April 1997 term of court. The district attorney had no power to decide which judges would preside that week, which citizens would be called to serve as jurors, or how the jury pool would be divided between the two courtrooms. One judge heard Wooten's pretrial motions and denied the motion challenging the case assignment system; the other judge presided over Wooten's trial. On the same day that Wooten's case was sounded for trial in the main courtroom, the district attorney assigned a similar case involving incest, aggravated sodomy, and aggravated child molestation to the annex courtroom. Once Wooten's case was assigned, the attorneys examined prospective jurors on voir dire, exercised their peremptory strikes, and selected a jury; the trial court exercised its discretion in ruling on trial motions, the admissibility of evidence, objections to arguments, and requests for jury charges; and the jury heard the evidence, received instructions on the law, and reached a unanimous verdict of guilty.

Based on these facts, we reject Wooten's argument that the illegal system violated his constitutional rights

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judge who is not impartial); *McIntyre v. State*, 266 Ga. 7 (1995) (rejecting view that substitution of judge at trial was a structural defect requiring automatic reversal).

and was so fundamentally unfair that the harm was inherent in the system. Instead, we hold that the district attorney's limited role in assigning cases to a judge and calling the court calendar did not violate Wooten's right to due process under the Georgia Constitution or United States Constitution.

3. Although we have determined that there was no violation of Wooten's constitutional rights, we must still decide whether the error at his trial was harmless under state law.[15] Our Court applies the highly probable test in reviewing a nonconstitutional error in a criminal case.[16] Given the district attorney's limited discretion and the subsequent independent roles that the trial judge and jury played, we conclude that it is highly improbable that the error in the circuit's assignment system contributed to the jury's verdict of guilty.

4. Because our holding vitiates the finding of mootness, on remand the Court of Appeals must consider Wooten's enumeration of error relating to a juror's removal.

Judgment reversed and case remanded. All the Justices concur, except Sears and Thompson, JJ., who dissent.

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[15] *Chapman v.California*, 386 U.S. 18, 21 (1967).

[16] See *Henderson v. State*, 251 Ga. 398 (306 SE2d 645) (1983); *Johnson v. State*, 238 Ga. 59 (230 SE2d 869) (1976).

S00G1574. THE STATE v. WOOTEN.

SEARS, Justice, dissenting.

For the reasons given in the Court of Appeals's opinion, I conclude that Wooten's conviction must be reversed. Accordingly, I respectfully dissent to the majority opinion. I am authorized to state that Justice Thompson joins in this dissent.

SUPREME COURT OF GEORGIA

ATLANTA

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S00G1574

THE STATE v. KENNETH R. WOOTEN

(Filed Oct. 6, 2000)

Upon consideration of the petition for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the certiorari be granted and that this order operate as the writ. The case will be automatically assigned to the calendar for January 2001 for hearing upon the record now of file.

C/A Case No. A99A2268

All the Justices concur.

[SEAL]

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

/s/ Lynn M. Stinchcomb
Chief Deputy Clerk.

FOURTH DIVISION
BLACKBURN, P.J.
ELDRIDGE and BARNES, JJ.

NOTICE: *MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION* to be deemed timely filed. (Court of Appeals Rules 4 and 37, December 23, 1999)

APRIL 10, 2000

In the Court of Appeals of Georgia

A99A2268. WOOTEN v. THE STATE. BL-106C

BLACKBURN, Presiding Judge.

Following a jury trial, Kenneth R. Wooten appeals his conviction of four counts of child molestation. Wooten contends that the trial court erred (1) in its assignment of cases in violation of Uniform Superior Court Rule (USCR) 3.1, (2) by allowing the admission of the victim's prior consistent statements prior to her testimony, and (3) by removing a juror during the third day of deliberations.

1. In Wooten's initial appeal, he contended that the trial court erred in denying his motion for legal case assignment and in using a party litigant to assign cases in violation of USCR 3.1. This Court remanded the case for a hearing to establish the facts surrounding the Lookout Mountain Judicial Circuit's case assignment system. Upon re-docketing in this Court, the case was transferred to the Georgia Supreme Court because it raised issues regarding the maintenance of a state court system which is within the inherent jurisdictional power of that Court. After such transfer, the Supreme Court decided *Cuzzort v. State*, 271 Ga. 464 (519 SE2d 687) (1999), in which it addressed the

issue presented herein. Having decided the issue, the Supreme Court remanded the present case for our consideration in light of its opinion in *Cuzzort*.

In *Cuzzort*, the Supreme Court noted that the "precise method of assigning and calendaring cases . . . must comport with the notion of due process . . . as well as the spirit and purpose of the uniform rules and applicable statutes." Id. at 464. It then determined that because the district attorney makes the case assignments to the judges and sets the trial calendar such system violated USCR 3.1[1] and abused the inherent discretion of OCGA § 17-18-1. Despite the Court's finding that the district attorney conducted himself in a professional and unbiased manner, the Court held that it could not "uphold a system of case assignment and calendaring that allows a party to assign a case and then randomly call the case for trial." Id. at 465(3). The Court determined that "[s]uch a system fail[ed] to comply with the intent and purpose of the uniform rules and applicable statutes, and thus fail[ed] to serve the administration of justice." Id.

In the present case, the parties stipulated, in pertinent part, that the district attorney's office: (1) promulgated the calendar for the criminal court; (2) selected which cases to start the week within each courtroom; (3) selected Wooten's case for trial before Judge Wood; and (4)

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[1] USCR 3.1 provides, in pertinent part,

> 3.1 Method of Assignment. In multi-judge circuits, unless a majority of the judges in a circuit elect to adopt a different system, all actions, civil and criminal shall be assigned by the clerk of each superior court according to a plan approved by such judges to the end that each judge is allocated an equal number of cases.

called the Wooten case to proceed. Under these circumstances, we are bound to follow our Supreme Court's precedent. In light of the Supreme Court's determination that such a system failed to serve the administration of justice we must reverse Wooten's convictions. Wooten had a right to a fair trial. We cannot say that his trial, administered under a system so impugned by the Supreme Court, was fair.

Although the State argues that no harm has been shown in this case, a reversal is still required. Initially, we note that this is the type of case where the harm is inherent in the system, although specific manifestations of harm may not be perceived. This is so because the harm arises from a breach of trust in the system of justice and from inherent human prejudices which are not always recognized even by those holding them. "[C]onvictions cannot be brought about by methods that offend 'a sense of justice.'" *Rochin v. California*, 342 U. S. 165, 173 (72 SC 205, 96 LE 183) (1952).

2. Wooten's argument that the child hearsay statute allows *a statement* made by a child to be admissible, but does not allow more than one such statement to be introduced was decided adversely to him in *Patterson v. State*, 237 Ga. App. 80 (1) (514) SE2d 873) (1999). See also OCGA § 24-3-16. Therefore, under the facts of this case, the trial court did not err in allowing the introduction of the victim's prior consistent statements before she testified.

3. Wooten's final enumeration involving the removal of a juror is rendered moot by our decision in Division 1.

Judgment reversed. Eldridge and Barnes, JJ., concur

Court of Appeals
of the State of Georgia

ATLANTA, October 15, 1999

The Court of Appeals hereby passes the following order:

A99A2268. KENNETH R. WOOTEN v. THE STATE

The above styled case having been transferred to this court by the Supreme Court of Georgia, it is hereby ordered that the case be hereby reinstated as a JANUARY, 2000, Term case. See *C C Financial, Inc. v. Ross*, 250 Ga. 832, 834 (3) (1983).

It is further ordered that the above stated case be placed on the February, 2000, calendar before the Fourth Division, Blackburn, PJ, Eldridge and Barnes, JJ. Oral argument is tentatively scheduled for February 3 or 4, 2000. Counsel will be notified of the exact date by receipt of the Court's oral argument calendar.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **OCT 15** 1999

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ William L. Martin, III

(LOGO) SUPREME COURT OF GEORGIA
Case No. S99A1819.

Atlanta October 15, 1999

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

KENNETH R. WOOTEN v. THE STATE

As it appears that the only issue in the above-styled appeal over which this Court would have jurisdiction, that being whether Lookout Mountain Judicial Circuit's case assignment method violated USCR 3.1, has been decided in *Cuzzort v. State*, S99A1120 (September 13, 1999), this appeal of a child molestation conviction hereby is returned to the Court of Appeals.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

[SEAL] Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn Stinchcomb, Chief Deputy Clerk

Court of Appeals
of the State of Georgia

ATLANTA, SEPTEMBER 7, 1999

The Court of Appeals hereby passes the following order:

A99A2268. Wooten v. The State

This direct appeal concerns the denial of a criminal defendant's motion for the Lookout Mountain Judicial Circuit to change its system for case assignment and calling cases for trial.

Uniform Superior Court Rule 3 provides in part: "In multi-judge circuits, unless a majority of the judges in a circuit elect to adopt a different system, all actions, civil and criminal, shall be assigned by the clerk of each superior court." Wooten contends that the motion court and the trial court of the Lookout Mountain Judicial Circuit erred in denying his motion for "Legal Case Assignment." Wooten contends that Lookout Mountain Judicial Circuit's system of having the District Attorney assign cases and decide the order of cases called for trial violates Uniform Superior Court Rule 3.1.

Maintenance of a state court system capable of providing for the administration of justice in an orderly and efficient manner falls within the inherent power of the Supreme Court. *Garcia v. Miller*, 261 Ga. 531 (408 SE2d 97) (1991). See also, *Lumpkin v. Johnson*, 270 Ga. 392 (509 SE2d 621) (1998). Additionally, this Court recently transferred an application for interlocutory appeal to the Supreme Court on the same issue as the present case. See *Cuzzort v. State*, A99I0185. The Supreme Court granted the application. See *Cuzzort v. State*, S99I0678. As this appeal raises an issue that invokes the application of that

inherent power, it is hereby transferred to the Supreme Court, and the prior order of this Court granting oral argument is hereby vacated.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta SEP – 7

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ William L. Martin, III

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: February 25, 2002

Todd Mitchell Johnson
JOHNSON LAW, P.C.
P. O. Box 48
Cohutta GA 30710

Case No. S01C1678

KENNETH R. WOOTEN v. THE STATE

COURT OF APPEALS CASE NO. A99A2268

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

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Sherie M. Welch, Clerk

_____

UNIFORM SUPERIOR COURT RULES

RULE 3. ASSIGNMENT OF CASES AND ACTIONS

3.1 Method of Assignment. In multi-judge circuits, unless a majority of the judges in a circuit elect to adopt a different system, all actions, civil and criminal, shall be assigned by the clerk of each superior court according to a plan approved by such judges to the end that each judge is allocated an equal number of cases. The clerk shall have no power or discretion in determining the judge to whom any case is assigned; the clerk's duties are ministerial only in this respect and his responsibility is to carry out the method of assignment established by the judges. The assignment system is designed to prevent any person's choosing the judge to whom an action is to be assigned; all persons are directed to refrain from attempting to affect such assignment in any way. Neither the clerk nor any member of his staff shall disclose to any person the judge to whom a case is or will be assigned until such time as the case is in fact filed and assigned.

* * *

IN THE SUPERIOR COURT OF DADE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	:	Criminal Action No. 97CR-10,633
vs.	:	
KENNETH RAY WOOTEN	:	

STIPULATIONS OF THE PARTIES

Pursuant to order of remand by the Court of Appeals for findings of facts "concerning the Lookout Mountain Judicial Circuit's case assignment system" and the manner in which the appellant's case was assigned, the parties hereby stipulate to the following facts in the above-captioned case.

1) Dade County has two court terms per year, and each term is utilized for the trial of criminal matters, yielding one week of criminal court per term;

2) Dade County has two courtrooms used for criminal jury trials;

3) The Lookout Mountain Judicial Circuit is served by four Superior Court judges: Jon B. Wood, Kristina Cook Connelly, William Ralph Hill and Ralph Van Pelt, and each judge served the circuit during April of 1997.

4) In December of each year, the judges of the Lookout Mountain Circuit prepare and issue to each attorney and clerk in the circuit a schedule for the upcoming calendar year designating which judge will be presiding as to each grand jury, arraignment, criminal motions, pleas and criminal jury trial weeks. The designation is indicated on the calendar by the initial of the individual judge's last name. The District

Attorney's Office has no control over which judge or judges will appear. The schedule is subject to change without notice and a different judge may in fact appear in place of the scheduled judge.

5) In the April 1997 term of Court in which Mr. Wooten was tried, Judge Wood tried the Wooten case in one courtroom, and Judge Connelly tried the case of State v. Wilburn Simmons in the other courtroom, each of the cases commencing on April 28, 1997.

6) The case of State v. Wilburn Simmons involved an indictment charging Simmons with 2 counts of incest, 2 counts of aggravated sodomy, and 2 counts of aggravated child molestation, 2 counts of child molestation, 2 counts of statutory rape and 2 counts of furnishing alcohol to a minor. It ended in an acquittal. [6/4/99 JBW]

7) In the April 1997 term of Court in which Mr. Wooten was tried, the Lookout Mountain District Attorney's office promulgated the calendar for the criminal court;

8) In the April 1997 term of Court in which Mr. Wooten was tried, the Lookout Mountain District Attorney's office selected which cases to start the week with in each courtroom and selected the Wooten case for trial before Judge Wood;

9) In the April 1997 term of Court in which Mr. Wooten was tried, as in other terms, after the conclusion of the calendar call, the judge on the bench in the main courtroom requested the District Attorney's Office to sound the case to be tried in the second courtroom and then the case to be tried in the main courtroom.

10) In the April 1997 term of Court in which Mr. Wooten was tried, Mary Jane Melton, the defense attorney,

was not given a choice before which judge or in which courtroom she wished to try the Wooten case;

11) The Lookout Mountain Judicial Circuit and the Dade County Superior Court did not have a case assignment system in operation during the April 1997 term of Dade Superior Court.

12) The Dade County Clerk of Court had no role in selecting or arranging cases in the calendar for the April 1997 term of Dade Superior Court criminal trials;

13) The Dade County Clerk of Court had no role in assigning cases to a particular judge for trial in the April 1997 term of Dade Superior Court criminal trials;

14) In the April 1997 term of Dade Superior Court criminal trials, the Lookout Mountain District Attorney's office handled the selection of cases for trial in each courtroom.

This 2nd day of June, 1999.

Stipulated to:

/s/ Todd M. Johnson
Todd M. Johnson, GA Bar No. 395651
JOHNSON LAW, P.C.
P.O. Box 407
Cohutta, Georgia 30710
(706) 694-4298 fax-(706)694-3171
FOR DEFENDANT

/s/ Herbert E. Franklin
Herbert E. "Buzz" Franklin
Lookout Mountain District Attorney
P.O. Box 1025
LaFayette, GA 30728
(706) 638-2121
FOR THE STATE

IN THE SUPERIOR COURT FOR THE COUNTY OF DADE STATE OF GEORGIA

STATE OF GEORGIA,	*	
	*	**CASE NUMBER**
vs.	*	**97 CR 10633**
	*	
KENNETH R. WOOTEN, DEFENDANT	*	(Filed April 21, 1997)
	*	

MOTION FOR COURT TO ESTABLISH ASSIGNMENT OF CASES

NOW COMES the Defendant in the above-styled case and shows the Court as follows:

1.

Rule 3.1 of the Uniform Rules for the Superior Court provides for a method of assignment of cases.

2.

The Lookout Mountain Judicial Circuit is a multi-judge circuit with four Superior Court Judges.

3.

Normally, under the Rules, cases should be assigned by the Clerk of the Superior Court under a plan approved by the Judge. However, a majority of the Judges in the Circuit can elect to adopt a different system.

4.

In any event, under Rule 3.1, the assignment system is to be designed to prevent any person from choosing the judge to whom an action it [sic] to be assigned.

5.

In the Lookout Mountain Judicial Circuit, no assignment of cases is made by the clerk.

6.

In the Lookout Mountain Judicial Circuit, the district attorney exercises almost complete authority and discretion to assign cases to the judge of his choosing.

7.

Under the system currently in existence, two judges will participate during the first week of criminal court. The district attorney is allowed the freedom to choose which court room he would normally prefer to use.

8.

The allowance of the district attorney to pick and choose judges violates the due process and equal protection clauses [sic] Fourteenth Amendment of the United States Constitution. In addition, said selection procedure violates the due process provision of Art. I, Sec. I, Par. I of the Constitution of the State of Georgia as well as the Equal Protection Provisions found in Art. I, Sec. I, Par. II.

9.

In addition, the assignment system currently in effect does not comply with the assignment provisions and notice requirements of Rule 3.4 of the Uniform Rules for the Superior Courts.

WHEREFORE, the Defendant prays that this Motion be granted and his case be set by assignment pursuant to the Uniform Rules.

Respectfully submitted, this 21st day of April, 1997.

/s/ Mary Jane P. Melton
MARY JANE P. MELTON

1817 Cross Street
Fort Oglethorpe, Georgia 30742
(706) 858-0023
Ga. Bar No. 560644

CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of the within and foregoing Motion upon Herbert E. (Buzz) Franklin, District Attorney for the Lookout Mountain Judicial Circuit by delivering to him or one of his duly appointed Assistants by:

__✓__ Hand Delivery
_____ Placing in the United States mail, First Class
_____ Placing in the United States mail, Registered

This 21st day of April, 1997.

/s/ Mary Jane P. Melton
MARY JANE P. MELTON
Attorney at Law

1817 Cross Street
Ft. Oglethorpe, Georgia 30742
(706) 858-0023
Ga. Bar No. 560644

IN THE SUPERIOR COURT OF

STATE OF GEORGIA

STATE OF GEORGIA	*	INDICTMENT NO. 97CR10633
VS.	*	OFFENSE: Child Molestation (4 cts. aggravated child molestation, aggravated sodomy
KENNETH R. WOOTEN	*	(Filed April 24, 1997)

ORDER

The above case having come on to be heard by this Court on the defendant's motion ~~to~~ for court to establish assignment of cases and after hearing the argument of counsel, the defendant's motion is hereby denied.

This 24th day of April, 1997.

/s/ Kristina Cook Connelly
JUDGE, SUPERIOR COURT
LOOKOUT MOUNTAIN
JUDICIAL CIRCUIT

Order prepared by:

/s/ Melodie Bedford
Assistant District Attorney
P.O. Box 1025
LaFayette, Georgia 30728
(404) 638-2121

In the Supreme Court of Georgia

Decided: SEP 13, 1999

S99A1120. CUZZORT v. THE STATE.

HUNSTEIN, Justice.

Appellant Terry Lee Cuzzort was indicted in the Lookout Mountain Judicial Circuit on charges of aggravated stalking. According to the method of case assignment established in that circuit, Cuzzort's case was assigned to a judge and placed on the court calendar by the district attorney. Cuzzort filed a series of pretrial motions challenging the system of assigning judges and calendaring cases presently employed in the Lookout Mountain Judicial Circuit, all of which were denied in a consolidated order. The trial court issued a certificate of immediate review and this Court granted Cuzzort's application for interlocutory appeal to determine whether the case assignment method employed in the Lookout Mountain Judicial Circuit violates Uniform Superior Court Rule 3.1. Finding that it does, we reverse.

1. Uniform Superior Court Rule 3.1 provides, in pertinent part,

> **3.1 Method of Assignment.** In multi-judge circuits, unless a majority of the judges in a circuit elect to adopt a different system, all actions, civil and criminal shall be assigned by the clerk of each superior court according to a plan approved by such judges to the end that each judge is allocated an equal number of cases.

The State contends the case assignment system used in the Lookout Mountain Judicial Circuit is the most efficient for a rural circuit with multiple counties and judges, and

the random case assignment method proposed in USCR 3.1 is impracticable. Under the plain language of the rule, multi-judge circuits may adopt a different method subject to the approval of a majority of the circuit's judges. *Lumpkin v. Johnson,* 270 Ga. 392 (1) (509 SE2d 621) (1998); *Cobb County v. Campbell,* 256 Ga. 519 (350 SE2d 466) (applying Rule 3.1 of the Uniform State Court Rules) (1986). Certainly, "judges, in their capacity as members of the judiciary, have the inherent authority to determine their own internal operating procedure for the selection of which of them shall hear cases. . . . [Cit.]" *Lumpkin,* supra at 394. Accordingly, we do not take issue with the Lookout Mountain Judicial Circuit's decision to adopt a more efficient system. The precise method of assigning and calendaring cases adopted by a multi-judge circuit, however, must comport with the notion of due process under the State and Federal constitutions, as well as the spirit and purpose of the uniform rules and applicable statutes. See id.

2. The purpose of the assignment system in multi-judge circuits is to "prevent any person's choosing the judge to whom an action is to be assigned." USCR 3.1. In this regard, we have approved of a system in which the chief judge makes assignments in accordance with a method specifically approved by a majority of the other judges because the chief judge is not such a "person" as described in the Rule. *Lumpkin,* supra at 394. In the Lookout Mountain Judicial Circuit, however, it is not the chief or other circuit judge who makes case assignments and sets the calendar but the district attorney. Because the district attorney is clearly within the category of persons directed to refrain from affecting case assignments under USCR 3.1, we find the method of case

assignment employed in the Lookout Mountain Judicial Circuit violates the clear mandate of that rule.

3. Further, we find an abuse of discretion under OCGA § 17-8-1 in that the Circuit's existing method of calendaring criminal cases permits the district attorney to call cases out of the order listed on the criminal trial calendar. OCGA § 17-8-1 requires that cases on a criminal docket be "called in the order in which they stand on the docket unless the defendant is in jail or, otherwise, in the sound discretion of the court." Although OCGA § 17-8-1 is a discretionary rule rather than a mandatory one, this discretion lies with the trial judge and not the district attorney. *Rosenbrook v. State,* 78 Ga. 111 (2) (1886); *Williams v. State,* 188 Ga. App. 496 (3) (373 SE2d 281) (1988). While a trial judge may in his discretion call cases out of order, under § 17-8-1, the district attorney is without authority to independently calendar and call cases for trial. The judges of the Lookout Mountain Judicial Circuit must take primary responsibility for the order in which criminal cases are called for trial.

The record fully supports the trial court's finding that the district attorney in this case has conducted himself in a professional and unbiased manner and used the authority given to his office solely to move cases more efficiently through the courts. Nonetheless, we cannot uphold a system of case assignment and calendaring that allows a party to assign a case and then randomly call the case for trial. Such a system fails to comply with the intent and purpose of the uniform rules and applicable statutes, and thus fails to serve the administration of justice.

Judgment reversed. All the Justices concur.

IN THE SUPERIOR COURT
FOR THE COUNTY OF CATOOSA,
STATE OF GEORGIA

STATE OF GEORGIA,	]	
	]	
Versus-	]	NO. 98 CR 00929
	]	
TERRY LEE CUZZORT,	]	(Filed Jan. 19, 1999)
	]	
Defendant.	]	

ORDER ON

(1) MOTION TO ESTABLISH ASSIGNMENT OF CASES AND TO PROHIBIT DISTRICT ATTORNEY FROM HAVING THE ABILITY TO "JUDGE SHOP."

(2) MOTION TO FOLLOW A CRIMINAL DOCKET,

(3) MOTION FOR COURT TO SET CRIMINAL TRIAL CALENDAR, AND

(4) MOTION FOR IDENTIFICATION OF CALENDAR CLERK

The above-styled case came before the Court for hearing on October 1, 1998. At that time, the above-styled motions were consolidated for hearing. An evidentiary hearing was held and substantial evidence was presented concerning the system of the appointment of Judges and calendaring of cases.

The Court finds that the Motions are accurate in their factual statements as to the system currently in existence. The Court finds that the same basic system has been in

place for twenty years. Specifically, the Court finds as follows:

1.

The Lookout Mountain Judicial Circuit is a multi-Judge circuit with four Superior Court Judges.

2.

In the Lookout Mountain Judicial Circuit, no assignment of cases is made by the Clerk.

3.

In the Lookout Mountain Judicial Circuit, the District Attorney exercises almost complete authority and discretion to assign cases to the Judge of his selection.

4.

Under the system currently in existence, two Judges will participate during the first week of criminal court. Two Judges will participate during the second week of criminal court. The Judges will not necessarily be the same Judges. The District Attorney is usually allowed the freedom as to which courtroom he would prefer to sound a case for trial.

5.

The Court allows the District Attorney the freedom to call the calendar without following O.C.G.A. §17-8-1.

6.

The Court does not normally exercise discretion on a case by case basis as to the order the District Attorney calls the cases.

7.

No calendar is prepared under the direction of the Judge for trial. Instead, the calendar is prepared by the District Attorney.

8.

The current calendar for Catoosa County lists the cases in alphabetic order as prepared by the District Attorney and set all cases for October 5, 1998, even though the calendar contained 33 pages with multiple cases per page.

9.

The calendar, as prepared, provides no meaningful notification to the criminal defendant as to when his case will be tried during the term of court.

10.

The District Attorney does not call the criminal docket in the order of the cases on the calendar.

11.

No calendar clerk is charged with the responsibility of setting and scheduling trials and actions to be assigned to a particular Judge in the Lookout Mountain Judicial Circuit or Catoosa County. The District Attorney normally determines the order in which cases are called for trial.

12.

The Court finds that District Attorney Herbert E. Franklin has conducted himself in an honorable and professional manner in fulfilling his duties as District Attorney.

13.

However, the Court further finds the current system which allows the District Attorney the discretion to calendar cases, call cases for trial, and assign Judges for trial is subject to abuse in multiple ways.

CONCLUSION FROM EVIDENCE

The Court finds that the current system is subject to the following concerns:

14.

The District Attorney may select a Judge who tends to punish the offense charged more severely;

15.

When an important evidentiary issue is anticipated, the District Attorney may call the case before the Judge most likely to rule in his favor;

16.

Citizens who are employed and paid on an hourly basis may be economically punished when the District Attorney requires them to sit at the Courthouse day after day waiting for the District Attorney to call their case. As such, some ~~innocent~~ [RVP] Defendants are required to choose between having their trial or entering a plea to keep their paychecks or jobs.

17.

The District Attorney can pick and choose the case to be tried depending on the tendencies of the Jurors empanelled at a particular time;

18.

The District Attorney has the advantage of waiting to call a case for trial until he is completely ready and the timing is convenient to state's witnesses. Yet, the defense is subject to a trial date, based upon the discretion of the District Attorney, before the defense may be completely ready or when inconvenient to defense witnesses;

19.

All cases are calendared on the same day. Therefore the defense counsel is expected to have his cases ready. The District Attorney can stagger his preparation since he determines the actual day a case will be tried.

RULING

Even though the Court has grave concerns about the potential for abuse, this Court does not believe that it has the ability to enter Orders on the above-styled Motions which can bind the other Superior Court Judges. Specifically, the Court would note that the Superior Court Judges of the Lookout Mountain Judicial Circuit have addressed the Assignment of Cases issue in criminal and civil cases by order filed May 11, 1998. (Exhibit A). Therefore, the Motions are hereby denied.

SO ORDERED this 15th day of January, 1999.

/s/ Ralph Van Pelt, Jr.
JUDGE RALPH VAN PELT, JR.
SUPERIOR COURT OF CATOOSA COUNTY

ORDER PREPARED BY:

/s/ C. A. Townley
CHRISTOPHER A. TOWNLEY
ATTORNEY FOR DEFENDANT
P. O. BOX 278
ROSSVILLE, GEORGIA 30741
(706) 861-6003
BAR NO.: 714925

Filed in Office
January 19, 1999
/s/ Kimberly J. Osborne
Deputy Clerk

IN THE SUPERIOR COURTS OF WALKER, DADE, CATOOSA AND CHATTOOGA COUNTIES STATE OF GEORGIA

Re: ASSIGNMENT OF CASES AND ACTIONS

(Filed May 11, 1998)

WHEREAS, the Lookout Mountain Judicial Circuit is a multi-judge circuit which is comprised of the Superior Court of Walker, Dade, Catoosa and Chattooga Counties which Circuit covers a large geographic area in Northwest Georgia, and;

WHEREAS, the four Superior Court judges of the Lookout Mountain Judicial Circuit alternate and rotate serving in the different courts in each of said counties in the circuit at different times from term to term during the year for both civil and criminal jury trials and non jury hearings on certain circuit days during each month, and;

WHEREAS, the undersigned, being all the Superior Court Judges of this multi-judge circuit have duly considered the Rule 3 method of assignment of cases as set forth in the Uniform Rules of the Superior Courts of the State of Georgia and believe it to be unworkable for the proper handling and disposition of civil and criminal cases in this multi-judge circuit and, therefore do hereby elect not to adopt and use said method of assignment of cases and actions, pursuant to said USCR 3 and USCR 1.2.

IT IS THEREFORE ORDERED, CONSIDERED, AND ADJUDGED, that the Superior Court Judges of the Lookout Mountain Judicial Circuit do hereby elect to continue to adhere to the system as previously adopted by

all Superior Court Judges since the adoption of the Superior Court Uniform Rules and presently used in this multi-judge circuit whereby Judges are designated and assigned to sit and preside on assigned days and weeks during the year in a designated county Superior Court of the Lookout Mountain Judicial Circuit during terms of Court in each county to hear such civil or criminal matters as may be presented and called for trial before them. During said periods, said undersigned Judges may also hear any and all other matters which may be specially set down or called before them during any term of Court or in vacation thereof in accordance with the laws and Constitution of the State of Georgia and the United States of America.

SO ORDERED, this 22 day of April, 1998.

/s/ John Bolling Wood
CHIEF JUDGE
JON BOLLING WOOD

/s/ Kristina Cook Connelly
KRISTINA COOK
CONNELLY

/s/ Wm. Ralph Hill, Jr.
WM. RALPH HILL, JR.

/s/ Ralph Van Pelt, Jr.
RALPH VAN PELT, JR.

CERTIFICATE EXEMPLIFICATION OF RECORD

STATE OF GEORGIA, CATOOSA COUNTY

CLERK'S OFFICE – ss.

I, NORMAN L. STONE, Clerk Superior Court of Catoosa County, do hereby certify that I have compared the foregoing copy of **the Order in Criminal Action File #98CR00929 the State vs. Terry Lee Cuzzort.**

with the original record thereof, now remaining in this office, and the same is a correct transcript therefrom, and of the whole of such original record and that this Court is a Court of Record.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this the **12th** day of **January**, 20**01**.

/s/ Norman L. Stone
Clerk Superior Court,
Catoosa County.